

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/02/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.460 of 1988

Sree Visalam Chit Fund Ltd.,
by its Manager, Tindivanam. .. Appellant

-Vs-

1. Vasudeva Achari
2. Gnana Sundari .. Respondents

This appeal suit is preferred under S.96 of The Code of Civil
Procedure against the judgment and decree dated 7.8.1987 in O.S.No.70 of 19 85
of the Subordinate Judge, Tindivanam.

!For Appellant : Mr.S.Parthasarathy
for Mr.S.Thangasivan

^For Respondents : Mr.R.G.Annamalai

:JUDGMENT

M.CHOCKALINGAM, J.

The plaintiff is the appellant herein.

2. This appeal has arisen from the judgment and decree of the learned
Subordinate Judge allowing the claim of the appellant/plaintiff in part in a
suit filed by them for recovery of money.

3. The case of the plaintiff is as follows:

The plaintiff is transacting chit business through its various branch
offices. Their branch office at Bangalore commenced the Chit No. TNBZ.1/48
on 30.5.83. The first defendant joined as a member of the said chit. The
duration of the chit is 25 months. The total value of the chit is
Rs.30,000/-, which is payable in instalments of Rs.600/- in fortnight. The
first defendant took the said chit in auction on 1 5.2.84 for Rs.20,450/- and
received the same on 6.3.84 from Tindivanam office, and he passed on a receipt
in favour of the plaintiff at Tindivanam. The second defendant executed a
guarantee agreement in favour of the plaintiff on 6.3.84 at Tindivanam
guaranteeing regular payment of remaining instalments by the first defendant.
The first defendant joined as a member of another chit which was commenced on
24.8.83. The value of the said chit is Rs.50,000/-, and the duration is 5 0

months. He purchased the said chit in auction on 16.11.83 for Rs.2 5,000/-. He received the chit amount at Tindivanam branch on 9.12.19 83 and passed on a receipt in favour of the plaintiff. The second defendant executed a guarantee agreement in favour of the plaintiff on 9.12.83 at Tindivanam guaranteeing regular payment of instalment amounts by the first defendant. Thus, the defendants are jointly and severally liable to pay both the chit balance amounts. Since the defendants have not paid the chit amounts despite demands, notices were issued on 13.3.83 for the first chit amount and on 21.9.84 for the second chit amount. The 2nd defendant created an equitable mortgage over her property by depositing title deeds with Cuddalore Branch of plaintiff on 10.12.1983. She wrote a letter on 7.3.84 acknowledging deposit of title deeds with the plaintiff as security for recovering the amounts. The plaintiff is entitled to enforce the equitable mortgage for realising the amounts due under the said chits. As the mortgagor and mortgagee are the same, the plaintiff is entitled to consolidate both the mortgages. The defendants are liable to pay Rs.52,006.50 with subsequent interest. Hence this suit.

4. The first defendant filed a written statement and an additional written statement with the following averments:

After receiving the chit amounts, he has paid the instalment amounts to the plaintiff without default. Thereafter, due to fall in business transaction, he was not able to pay the dues in time. Contrary to the agreement between the parties, the plaintiff claimed interest, and failed to deduct the kasar amounts. Neither the 1st defendant nor the 2nd defendant have created any mortgage with the plaintiff. The plaintiff at the time of paying the chit amounts obtained signatures in unfilled forms and blank papers. The plaintiff could have concocted such unfilled forms into a letter dated 7.3.85 as alleged in the plaint. The plaintiff has not filed this suit as contemplated in Order 34 Rule 1 of C.P.C. The 1st defendant has time to pay the chit amounts, since the chits has not expired still. Therefore, the suit filed by the plaintiff is premature. The plaintiff has not deducted the chit amounts paid by him. Even after the filing of the suit, he is paying the chit amounts to the plaintiff.

5. The first defendant would further state that the plaintiff viz. the Tindivanam branch has no authority or locus standi to file a suit on behalf of Bangalore branch as the transaction is one by the latter; that the Branch Manager of plaintiff's Tindivanam Branch is not proper person to prosecute the suit on behalf of Bangalore Branch; that as per the Central Act 40/82, the disputes between the foreman and the subscriber shall be referred to the Registrar of the Chit, and the jurisdiction of the Civil Court has been taken away; that the two chit transactions have not been duly registered as required under the Chit Funds Act; that the remedy, if any available to the plaintiff, has to be worked out before Bangalore Civil Court; and hence, the suit may be dismissed with costs.

6. In the reply statement, the plaintiff has averred that the Chit Funds Act 40/82 was not applicable to Bangalore Branch when the chits were subscribed; that only if the chits are registered under Act 40/8 2, the provision of the Act will apply; that Section 1(3) of the Act clearly says that the Act shall come into force on such date as the Central Government may by notification in the Official Gazette appoint and difference dates may be appointed for different States; that this Act comes into force in Tamil Nadu on 13.4.1984; that only the chit rules of the plaintiff Company are

applicable; that the plaint is filed in the form contemplated under Order 34 Rule 1 of C.P.C., and hence, the suit may be decreed with costs.

7. On the above pleadings, the trial Court framed the necessary issues and tried the suit. After hearing both sides and considering the oral and documentary evidence, the learned Subordinate Judge granted a decree only for a sum of Rs.31,218.50 with subsequent interest at 12% from the date of plaint till realisation. Aggrieved over the disallowed portion of the finding of the trial Court, the plaintiff has brought forth this appeal.

8. As seen above, the appellant/plaintiff has brought forth this appeal, aggrieved over the judgment of the trial Court though a part of its claim for recovery of a sum of Rs.52,006.50 with subsequent interest based on two chit transactions was allowed by the Court below.

9. Admittedly, on 30.5.1983, the first defendant joined as the member of the first chit No.TNBZ.1/48, which was for a duration of 25 months with monthly instalment of Rs.600/-, and thus, the total value of the first chit was Rs.30,000/-, and on 24.8.1983, the first defendant has become a member of another chit No.TLN-8/23, which was for a duration of 50 months with monthly instalment of Rs.1,000/-, and thus, the total value of the second chit was Rs.50,000/-. It is also not in dispute that the first defendant took the first chit in auction on 15.2.1984 for Rs.20,450/- and received the same on 6.3.1984; and that he was also the successful bidder in respect of the other chit on 16.11.1983 for Rs.25,000/-, and received the amount on 9.12.1983, and both the chit amounts were received by the first defendant at the Branch of the plaintiff at Tindivanam. All these above facts were candidly admitted by the first defendant in the course of his written statement and also in his evidence. The second defendant though not filed a written statement has adopted the written statement of the first defendant. The factum of execution of Ex.A1 receipt dated 6.3.1984 by the first defendant for the first chit amount, Ex.A2 surety bond by the second defendant in respect of the first chit transaction, Ex.A5 receipt dated 9.12.1983 by the first defendant for Rs.25,000/- being the chit amount under the second chit transaction, and Ex.A6 surety bond executed by the second defendant in respect of the second chit transaction is not disputed by the defendants.

10. While making the instant claim, the appellant/plaintiff has sought for a relief to direct the respondents/defendants to pay personally Rs.52,006.50 with subsequent interest within the stipulated period and on their default, the mortgaged property should be directed to be sold for the realisation of the said amounts. The lower Court has found that the defendants were liable to pay Rs.11,966/- on the first chit transaction, Rs.19,252/- under the second chit transaction and also the interest at 12% per annum on both the chit transactions. It was the specific case of the plaintiff that the second defendant apart from executing the guarantee bonds as evidenced by Exs.A2 and A6 has also executed a memorandum of deposit of title deeds as additional security in respect of the said two chit transactions, which were marked as Exs.A7 and A8. But, the lower Court accepting the defence that no equitable mortgage was created by the second defendant, has rejected the case of the plaintiff with regard to the creation of an equitable mortgage by the second defendant. Thus, aggrieved over the non-granting of the relief in respect of the mortgage decree and also the non-decreeing of the entire claim in respect of the second chit transaction, the plaintiff has brought forth this appeal. The defendants' plea that the

trial Court had no jurisdiction to try the suit; and that the suit was premature was negated by the lower Court. Even in respect of the decretal part as stated above, the defendants have not brought forth any cross appeal. Hence, the contentions put forth by the respondents' side on the findings already recorded by the lower Court in respect of those issues cannot be canvassed in this appeal.

11. Arguing for the appellant, the learned Counsel Mr.S.

Parthasarathy would submit that the trial Court on the face of the evidence should have held that the appellant was entitled to a mortgage decree of the suit claim; that it is pertinent to note that the second respondent had acknowledged and confirmed the deposit of the title deed under Ex.A7 as security under Ex.A8; that the appellant claimed the mortgage decree on the footing of a mortgage by deposit of title deeds created by the second respondent and not on the footing of a mortgage deed; that the suit mortgage was true and valid; that the respondents failed to establish that Ex.A7 relating to the mortgaged properties was not delivered to the appellant as security; that after delivering Ex.A7, the second respondent never asked for the return of it; that in the instant case a true and valid mortgage had been created by deposit of title deeds by the second respondent; that the lower Court was not correct in holding that only a sum of Rs.25,000/- was paid under the second chit, and hence, the respondents were liable for the said amount; that it is not open to the respondents to claim that only the sum of Rs.25,000/- was received in advance in respect of the second chit transaction, and the same was not the case of the respondents in their written statement; that it is pertinent to note that the first respondent has in fact admitted in his written statement that it was true that he took the chits in the auction as stated in the plaint; that the first respondent having bid the chit for Rs.25,000/- only, the respondents were bound to pay the balance of chit amount; and hence, the findings of the lower Court not granting a mortgage decree and not decreeing the entire suit amount are unsound and untenable and are liable to be set aside, and a decree has got to be granted in favour of the appellant/plaintiff.

12. The learned Counsel appearing for the respondents Mr.R.G.

Annamalai would argue that only on proper appreciation of oral and documentary evidence the lower Court has found that the appellant was not entitled to a mortgage decree and the defendants were liable to answer the claim of the plaintiff only to the extent of Rs.25,000/- under the second chit transaction; that neither the first defendant nor the second defendant created any mortgage with the plaintiff; that the plaintiff has not established its claim in respect of the remaining amount under the second chit transaction; that there is nothing to interfere in the judgment of the trial Court, and hence, the appeal has got to be dismissed

13. After careful consideration of the rival submissions and scrutiny

of the available materials, the Court has to necessarily sustain the finding recorded by the Court below that the second defendant did not execute any equitable mortgage as contended by the plaintiff.

14. It is specifically averred by the plaintiff in paragraph 6 of the

plaint which runs as follows:

"The 2nd defendant created an equitable mortgage over her properties by depositing title deeds with Cuddalore branch of plaintiff on 10.12 .83. It was created as additional security for the purpose of securing amounts payable to plaintiff under Chit No.T.I.N.8/23. Again the same document duly deposited with the plaintiff was treated deposit of title deeds for securing amount due under Chit T.N.B.Z.1/48."

Denying the above averments, the first defendant in the course of his written statement, which was adopted by the second defendant, has specifically stated that they did not create any mortgage with the plaintiff; and that the plaintiff could have concocted the alleged letter as to the deposit of title deeds using the unfilled forms wherein the signatures of the defendants were obtained at the time of paying the chit amounts. They have also further added that on the direction of the plaintiff, the defendants produced the documents for the purpose of establishing that they had means to repay the chit amounts. Since the creation of the mortgage by deposit of title deeds was emphatically denied by the defendants, a duty was cast upon the plaintiff to prove the same as required by law.

15. Needless to say that three requisites are essential for creating a mortgage by title deeds. They are:

- (i) Debt;
- (ii) Deposit of title deeds; and
- (iii) An intention that the title deeds shall be the security for the debt.

An equitable mortgage may cover an existing as well as a future debt. In order to accept the creation of mortgage by deposit of title deeds, the factum of delivery of the title deeds should be proved, if it is so pleaded. Apart from the above two essentials, the law would strictly require that the intention to create a security thereon should exist. In the absence of the intention to create a security, the deposit of title deeds alone cannot by itself create an equitable mortgage. It is absolutely nothing at all unless the deposit of title deeds actually effects the transfer of an interest in the immovable property for the purpose of security on the money advanced or to be advanced. Mere possession of deeds without the necessary evidence of the contract under which the possession was obtained or of the manner in which the possession originated so that a contract may be inferred, will not create an equitable security. It is true that whether the deeds were deposited with an intention to make them as security for the debt is a question of fact, and the same has to be decided just like any other fact on oral, documentary or circumstantial evidence. When the available evidence is subjected to careful scrutiny, the Court is unable to see the presence of the three essentials as stated above.

16. Admittedly, the chit amounts under the two chit transactions viz. Rs.20,450/- and Rs.25,000/- were given to the first defendant on 6.3.1984 and 9.12.1983 respectively, and receipts were passed on by the first defendant under Exs.A1 and A5. As per the chit agreement entered into between the parties, the chit moneys should have been disbursed to the subscriber only on his furnishing the satisfactory security for the total amount of all the remaining subsequent instalments, and hence, under such circumstances, the second defendant was called upon to furnish the security bonds. Therefore, the mortgage by deposit of title deeds by the second defendant should have

been created at or about the time when the chit moneys were actually paid to the first defendant. According to the plaintiff Exs.A7 and A8 memorandum of deposit of title deeds executed by the second defendant at Cuddalore bear the dates 10.12.1983 and 7.3.1984 respectively. It is the admitted case of the plaintiff that the first defendant was a member of the above two chits conducted at Bangalore Branch. It is pertinent to note that both the chit amounts were paid by the plaintiff's Tindivanam Branch on 6.3.1984 and 9.12.1983. In order to prove the deposit of title deeds by the second defendant on 10.12.1983 and 7.3.1984 under Exs.A7 and A8, the plaintiff's Branch Manager was examined as P.W.1. He has deposed that on 10.12.1983, the second defendant executed an equitable mortgage under Exs.A7 and A8. He has not stated that the second defendant executed Exs.A7 and A8 on 10.12.1983 and 7.3.1984 respectively, nor has he stated the place of execution or deposit of title deeds. The first defendant examined as D.W.1 though has denied the mortgage by the second defendant, was confronted with Exs.A7 and A8 documents. 17. Before filing the suit, the plaintiff issued a notice under Ex. A9 on 21.9.1984 through its Counsel from Bangalore. The said notice contains thus:

"4. As security there for the of you has/have also deposited with us the title deeds relating to his/her/their house/and/house and land situate in"

If really the second defendant executed an equitable mortgage by deposit of title deeds in favour of the plaintiff, Ex.A9 notice should have contained all necessary particulars. But, the very reading of the above contents of Ex.A9 notice would cast a doubt whether the second defendant executed any equitable mortgage as contended by the plaintiff. Even in the second notice under Ex.A12 dated 13.3.1985, it was stated that both the defendants have deposited their title deeds. But, it did not contain either the date or the place of the alleged deposit of title deeds or the execution of the memorandum. In view of the evidence incomplete and inconsistent to the pleadings, it would be very difficult to hold that the second defendant executed an equitable mortgage by deposit of title deeds with an intention to create the same in favour of the plaintiff in order to clear the chit amounts. As stated above, the mere custody of a document namely a Will in the instant case, would not be suffice to hold that a mortgage by deposit of title deeds was created by the second defendant, and hence, the lower Court's finding in that regard has got to be sustained.

18. Admittedly, the first defendant was a member of the second chit for a value of Rs.50,000/-, and he was to pay 50 instalments at the rate of Rs.1,000/- each. It is not disputed by the first respondent that he paid only 14 instalments totalling to Rs.8,639/-; and that he was entitled for the kasar amount of Rs.5,361/-. The first defendant has paid only 14 instalments, and he committed default in respect of the rest of the instalments. He was successful bidder in the auction held on 16.11.1983, and he purchased the chit for Rs.25,000/-. He has received the said chit amount of Rs.25,000/- on 9.12.1983 as found under Ex.A5 receipt. The specific case of the appellant/plaintiff was that deducting the total amount paid by the first defendant up to the 14 instalments viz. Rs.8,639/- and the kasar amount of Rs.5,361/-, he was liable to pay Rs.36,000/- towards the future instalments, and apart from that, since he has defaulted in making the instalment payments, he was liable to pay interest at the rate of 12% per annum as per the

agreement entered into between the parties, which came to Rs.4,040/-, and thus, in toto he was liable to pay Rs.40,0040/- towards the second chit transaction. The lower Court has granted a decree only to an extent of Rs.19,252/-, since it was on the erroneous view that the defendants were liable to pay only Rs.25,000/- which was paid by the plaintiff as per receipt under Ex.A5. It remains to be stated that the total value of the second chit was Rs.50,000/-, and the first defendant who paid only 14 instalments, has taken the said chit in auction on 16.11.1983 for a price of Rs.25,000/-, and hence, the said amount of Rs.25,000/- was paid to him on 9.12.1983, as evidenced by Ex.A5. Needless to say that the respondents were liable to pay the balance of the chit amount viz. Rs.36,000/- representing 36 months. At this juncture, the learned Counsel for the appellant raised two contentions that the suit was filed even before the completion of the 50 instalments period, and the plaintiff was not entitled for the interest as per the Chit Funds Act. Both these contentions cannot be countenanced, as they are without any substance. It is an admitted position that the first defendant, who was the successful bidder, did not pay the instalment amount on the due dates, and hence, as per the agreement legal action could be taken against him and the surety viz. the second defendant also. Apart from that, Clause 3(a) of Ex.A4 agreement reads thus:

"3(a) Subscribers who have not paid their call amounts on the due dates will have to pay pay interest at 12% and settle the amount within a week."

Thus, under the agreement, the first defendant was liable to pay interest at the rate of 12%. The Court is of the view that the plaintiff's claim for Rs.40,040/- towards the remaining subsequent instalments and the interest at 12% per annum on the defaulted amounts was legal and correct, and the same has got to be granted. Therefore, the lower Court was not correct in disallowing a part of the claim of the plaintiff in respect of the second chit transaction.

19. In the result, this appeal suit is allowed in part setting aside the judgment and decree of the lower Court disallowing a part of the plaintiff's claim under the second chit transaction. Suit is decreed for a sum of Rs.52,006.50 with interest at 12% from the date of plaint till realisation. Costs throughout is ordered. In other respects, this appeal is dismissed.

Index: Yes

Internet: Yes

To:

1) The Subordinate Judge,
Tindivanam.

2) The Record Keeper
V.R.Section
High Court
Madras.

nsv/

